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No. 85-495

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,
v.
RONALD PHILBROOK
Respondent.

On Appeal From The United States
Court of Appeals For The Second Circuit

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND BRIEF OF COUNCIL ON RELIGIOUS
FREEDOM AS AMICUS CURIAE IN SUPPORT OF
RESPONDENT**

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**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

Council on Religious Freedom respectfully moves the Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the respondent, Ronald Philbrook, has been obtained; but counsel for the petitioners has not consented to the filing of a brief by Council on Religious Freedom.

The applicant, Council on Religious Freedom, has an interest in this case in that it is an organization composed of individuals who are active in church affairs, some in official church responsibilities, and some as lay leaders. Many of the members of the board are directly involved in the day-to-day activity of attempting to work out accommodation in the work place for individuals whose religious beliefs conflict with work rules and requirements. These individuals have substantial knowledge and experience

concerning the problems that arise in working out accommodations under Title VII of the Civil Rights Act of 1964. Legal counsel for the organization have been involved in hundreds of Title VII accommodation cases and have direct knowledge of the problems that develop in attempting to work out accommodation for religious needs under the requirements of Title VII.

The purpose of the Council on Religious Freedom as set forth in its Articles of Incorporation include "taking action to eliminate religious discrimination in public and private employment and other areas of concern which interfere with the full experience of religious freedom."

This *Amicus Curiae* brief takes the position that an employer must adopt the accommodation of an employee's religious beliefs that least disadvantages the employee with regard to the terms and conditions of employment so long as it does not cause undue hardship to the employer. This *Amicus* contends that Title VII does not merely require the elimination of a conflict between a work requirement and a religious practice or belief, but also makes it an unlawful employment practice for an employer to discriminate "with respect to compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-(a)(1). For this reason, the requirement that the accommodation least disadvantageous to the employee be adopted follows directly from the language of the Act.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Did the court below err in holding that the employee established a prima facie case of religious discrimination under Title VII of the Civil Rights Act of 1964 by refusing to provide an employee with additional paid leave for religious observance?

2. Does Title VII require the employer to accept the employee's proposal where the employer and the employee have each proposed reasonable accommodations of the employee's religious beliefs and the employer's proposal results in an economic disadvantage to the employee?

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate religious discrimination in public and private employment and other areas of concern which interfere with the full experience of religious freedom.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in official capacity, and some on a lay basis, but all recognize the importance of preserving and promoting the concept of the constitutional principle of the "free exercise of religion" and opposing any encroachment by private or governmental agencies which limit or tend to inhibit the free exercise of religion.

SUMMARY OF ARGUMENT

The respondent met his burden of proving a prima facie case of religious discrimination under Title VII. It is not necessary that the respondent show that he was faced with the choice of observing his religion or keeping his job. Title VII protects against more than just discharge. It prohibits discrimination with respect to compensation, terms, conditions, or privileges of employment. The action of the school board in docking the respondent's pay was a sufficient detriment to the respondent to make out a prima facie case of discrimination.

An employer must adopt the accommodation of an employee's religious beliefs that least disadvantages the employee with regard to the terms and conditions of his employment so long as it does not cause undue hardship to the employer. Because of the unique nature of the problem of accommodating religious practices and observances, an employer can never rely solely on the reasonable and neutral character of its policies to fulfill its duty to accommodate.

This Court's opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), does not hold that an employer can never be required to adopt an accommodation that contravenes a provision of a collective bargaining agreement. The undue hardship found in *Hardison*

resulted from the violation of contractual seniority rights of employees occasioned by the proposed accommodation.

ARGUMENT

I. The Respondent Proved A Prima Facie Case Of Religious Discrimination.

In order to make out a prima facie case of religious discrimination, a plaintiff must prove:

- (1) He or she has a bona fide religious belief that conflicts with an employment requirement; (2) He or she informed the employer of this belief; (3) He or she was disciplined for failure to comply with the conflicting employment requirement.

Philbrook v. Ansonia Board of Education, 757 F.2d 476, 481 (2nd Cir. 1985) (quoting, *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

In this case there is dispute whether the respondent sustained his burden under the first and third prongs of this test.

As to the first prong, the dispute revolved not around the existence of a conflict between the asserted belief and the respondent's work schedule, but around the sincerity of the respondent's belief. The district court refused to find that the respondent was insincere in his belief, and the court of appeals stated that any such finding would have been clearly erroneous. It is difficult to understand how the argument that a person who for several years observed the commands of his religion and had incurred considerable financial loss is insincere to his beliefs. A finding of insincerity in such a case would require substantial evidence of insincerity. The only argument advanced against the respondent's sincerity appears to be that he was less than totally scrupulous in following the precepts

of his faith. This is not enough. Title VII is not limited in its protection to the most pious among us.

There is also a dispute in this case as to whether respondent has shown a sufficient adverse action on the part of his employer to make a prima facie case under Title VII. The district court and the dissent in the Second Circuit make much of the fact that respondent was not faced with discharge for observing the holy days of his faith. But Title VII prohibits much more than the discharge of an employee because of his religion. It also makes it an unlawful employment practice for an employer to discriminate "with respect to compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).¹

"The benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment." *Hishon v. King & Spalding*, 104 S.Ct. 2229, 2235 (1984) (emphasis in original). In this case the respondent has shown that he suffers in the amount of compensation he receives because of his religious practices. This is a violation of Title VII. *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976). The respondent also has shown that he has been denied the use of personal business leave days because his "legitimate and necessary" business is religious in nature. This is discrimination in the privileges of employment. "A benefit that is part and

¹ 42 U.S.C. § 2000e-2(a)(1) provides in pertinent part: "(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon*, 104 S.Ct., at 2234.

It is important to understand what is "discrimination" in Title VII. This court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), rejected the concept of "ill will" as the proper legal definition of "discrimination" in Title VII. The Court held that the anti-discrimination requirements of Title VII are also directed against the "consequences" or "effects" of an employment system. The absence of discriminatory intent does not prevent the making of a prima facie case under Title VII.

This Court said in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977), "The emphasis of both the language and legislative history of [Title VII] is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to . . . religion." Respondent has shown that he is treated differently than other employees similarly situated because of his religious beliefs. An employee who needed to take off work for personal, secular business would get those days off with pay. But because the respondent needed those three days off for religious reasons, he would have to take them without pay. Therefore, the respondent and another employee could take the exact same number of days off, and the respondent would receive less compensation because his absences were necessitated by his religious beliefs. This differential treatment, even if ultimately justifiable under the statute, is enough to make out a prima facie case. Contrary to the view expressed in Judge Pollack's dissent, the school board's refusal to allow the use of personal business days for religious observance is an "artificial,

arbitrary, and unnecessary" barrier to full equality in employment opportunity for the respondent.

II. Title VII Requires An Employer To Accept An Accommodation Which Least Disadvantages An Employee So Long As It Does Not Cause Undue Hardship.

Title VII requires an employer to reasonably accommodate an employee's religious observance or practice unless such accommodation would cause undue hardship. The Second Circuit interpreted Title VII as requiring an employer to accept the accommodation preferred by the employee when various accommodations are proposed. Implicit in this requirement is the understanding that the employee's preference is dictated by the degree to which various proposals disadvantage him. It cannot, however, be argued that an employee may arbitrarily compel adoption of an accommodation more inconvenient to the employer when a less inconvenient accommodation is available that imposes no greater a disadvantage on the employee.

The requirement that the accommodation least disadvantageous to the employee be adopted follows directly from the language of the Act.² Title VII does not protect

² The "Guidelines on Discrimination Because of Religion" issued by the Equal Employment Opportunity Commission in 1980 states:

When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation is reasonable by examining:

- (i) The alternatives for accommodation considered by the employer or labor organization; and
- (ii) The alternatives, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. There-

only against discharge and the failure to hire. It makes an unlawful employment practice a policy that has a discriminatory effect with respect to compensation, terms, conditions, or privileges of employment. If Title VII only protected against discharge, it could be argued that any accommodation that allowed the employee to keep his job satisfied the employer's obligation. But a proposal that alleviates some of the burdens on the employee while still disadvantaging him with respect to compensation, terms, conditions, or privileges of employment is not a reasonable accommodation if the employer can, without undue hardship, further alleviate the burden. On the contrary, it continues to be an unlawful employment practice under Title VII. The intent of the statute is to place the employee, as much as possible, on an equal footing with all other employees.

The court of appeals was correct to rule that the school board's leave policy, standing alone, did not satisfy its obligation to reasonably accommodate the respondent's religious beliefs under Title VII. The court proceeded to unnecessarily confuse the issue by stating that it presumed that the board's leave policy was "reasonable."

The problem with the court's language is that it implies that the employer may be able to satisfy its obligation to accommodate merely by pointing to an existing generally applicable policy that is "reasonable" in the absence of a competing accommodation put forth by the employee. Such an interpretation would shift the burden to attempt

fore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

29 C.F.R. § 1605.2(c)(2), as amended, 45 Fed. Reg. 72610 (1980)

an accommodation from the employer to the employee. It also fails to fully understand the unique need for protection from religious discrimination addressed by § 701(j) of the Act.³

Whereas discrimination based on race, color, or national origin usually affects broad classes of citizens in significant numbers, the problem of religious discrimination usually arises in cases involving isolated individual members of minority religions. Religious discrimination cases implicate not only Fourteenth Amendment rights but also First Amendment rights. Whereas racial discrimination cases arise because an employer unlawfully treats broad classes of citizens differently, religious discrimination cases often are the result of individuals asserting their right to be different. It is the widely varying practices of myriad minority religions that, particularly in the area of Sabbath and holy day observance, causes conflict.

The members of these groups normally suffer not because of intentional invidious discrimination but because of the insensitive and inflexible application of otherwise valid policies to their particular situation. See, generally United States Commission on Civil Rights, *Religion in the Constitution: A Delicate Balance*, ch. 3 (1983). In order to protect against the harm caused by such inflexibility and insensitivity, Congress enacted § 701(j) requiring employers to accommodate "all aspects

³ Section 701(j) codified at 42 U.S.C. § 2000e(j) provides: "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

of religious observance and practice." The whole approach of § 701(j) is focused on the individual employee. The duty to accommodate requires consideration of the employee's particular needs:

Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the unique circumstances of the individual employer-employee relationship.

Redmond v. GAF Corp., 574 F.2d 897, 902-903 (7th Cir. 1978).

An affirmative attempt by the employer to accommodate the employee's religious practices is needed. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979).

In this case, it is the very policy pointed to by the school board as a reasonable accommodation that causes the respondent to suffer the financial loss he points to as a discriminatory effect. To allow an employer to rely on the reasonableness or neutrality of existing policies to satisfy his burden to attempt accommodation would make a nullity of § 701(j). "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S., at 431. It is the conflict between such policies and the religious dictates of the employee's faith that necessitates accommodation.

The fact that the employer may ultimately be able to demonstrate that any accommodation deviating from existing policy would impose undue hardship on the conduct of the employer's business does not excuse the employer from attempting to find such an accommoda-

tion. The burden of proving that undue hardship would be caused by available accommodation is on the employer. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d, at 402. See also *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *McDaniel v. Essex International, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978).

Judge Pollack, in his dissent in the Second Circuit, states: "The issue in this case is whether the School Board should be forced to pay a teacher for not working." *Philbrook*, 757 F.2d, at 488. That is an inaccurate simplification of the case. This case is not like *Pinsker v. Joint District No. 28 J*, 735 F.2d 388 (10th Cir. 1984), where the teacher claimed that Title VII required the school board to increase the number of paid religious holidays. The respondent claims that the school board's refusal to let him use the personal leave days under the existing contract for religious purposes is an unnecessary and arbitrary burden on his religious observance. The court of appeals correctly held that the burden of proof on remand would be on the school board to show that the use of personal business days for religious observance would cause undue hardship on the employer. *Philbrook*, 757 F.2d, at 485-86, n. 8. The same is true with respect to the respondent's proposal to pay for a substitute. Any school board arguments that this proposal causes undue hardship due to lessened efficiency and discipline do not hold water because the school board's present policy of allowing the respondent to take the necessary days off without pay also necessitates the use of a substitute. The effect on efficiency and discipline would be identical. The school board should be required to show much more on remand in order to demonstrate that this proposal would cause undue hardship.

Much confusion regarding an employer's duty to accommodate the religious practices and observances of an employee has been caused by the unwarranted interpretation of this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), by employers and lower courts. This case presents a prime example of the misuse of *Hardison* as precedent. Besides a passing reference to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977), *Hardison* is the only Title VII case cited as authority by the district court. It quotes *Hardison* at length. Although it is difficult to comprehend the exact basis for the district court's ruling, it appears that the court ruled that the respondent had failed to prove a prima facie case of discrimination. The district court seems to use *Hardison* to support the proposition that a plaintiff must prove that the discriminatory actions of an employer were outside the terms of a valid collective bargaining agreement. The district court's confusion regarding *Hardison* is echoed in Judge Pollack's Second Circuit dissent. Judge Pollack also felt that the respondent had failed to prove a prima facie case. He too relies on *Hardison*:

The neutral leave policy challenged here is embodied in a valid collective bargaining agreement. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . ." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79, 97 S.Ct. 2264, 2274, 53 L.Ed.2d 113 (1977). Where, as here, the agreement neither impairs employment status nor imposes any artificial, arbitrary, and unnecessary barriers to employment, then, as the Supreme Court stated in *Hardison*, "we do not believe that the duty to accommodate requires [the employer] to take steps inconsistent with the otherwise valid [collective bargaining agreement]."

Id. Paid leave from employment is neither contractually nor Constitutionally mandated.

Since the School Board's leave policy does not discriminate on the basis of religion, plaintiff failed—as early as the close of his case—to make out a prima facie case.

Philbrook, 757 F.2d, at 489 (brackets in original).

The widespread use of *Hardison* to support the view that employers and unions need not consider any deviation from a valid collective bargaining agreement when attempting to accommodate an employee's religious practices cuts the very heart out of Title VII's protection of religious observance. As explained above, problems concerning accommodation of a religious practice rarely result from an intentional invidiously discriminatory policy. To excuse employers and unions from any accommodation that deviates from any of the terms of a valid collective bargaining agreement effectively negates Title VII's protection for a large segment of the work force.

Such a result is not justified by the Court's decision in *Hardison*. The Court there was concerned with a proposed accommodation that would deprive some employees of their legitimate contractual rights under a seniority system. The court refused to require an accommodation that would give preference to an employee because of his religious beliefs to the detriment of another employee. The Court's finding of undue hardship under such an accommodation rested upon the burden imposed on other employees. Since what constitutes "undue hardship" is not set out in the statute with clearly defined parameters, the resolution of this issue turns on the particular facts of the case. *Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975), citing, *Cummins v.*

Parker Seal Co., 516 F.2d 544, 551 (6th Cir. 1975); *Redmond v. GAF Corp.*, 574 F.2d, at 902-903.

Hardison cannot fairly be read as ruling that undue hardship exists whenever a proposed accommodation is at variance with the collective bargaining agreement. When a proposed accommodation does not infringe upon valuable rights of other employees, *Hardison* is not applicable. More particularly, *Hardison* dealt with seniority rights. The Court's decision was influenced by the special recognition of seniority systems by Title VII. 42 U.S.C. § 2000e-2(h). An accommodation that deviates from a provision of a collective bargaining agreement other than the seniority system and imposes some burden on other employees does not necessarily cause undue hardship.

The attempt by the school board to rely on the reasonableness of its collective bargaining agreement and the citation of *Hardison* point out the need for this Court to clearly state the limits of the *Hardison* ruling.

In examining the impact of employment policies and practices from the viewpoint of its effect on an employee's religious practice, an employer should examine its current practices and determine whether they, by conflicting with known employee religious practices, produce present discriminatory effects. Thus, an employer that maintains a system or contractual requirement adversely affecting Sabbath-keepers must establish that an alternative practice is not available to accommodate such burdened employees.

In *Robinson v. Lorillard*, 444 F.2d 791, 798 (5th Cir. 1971), the Fifth Circuit stated:

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the busi-

ness . . . and there must be available *no acceptable alternative policies or practices* which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . impact. [emphasis supplied]

An employer and labor organization must, therefore, scrutinize their policies, practices, and contract provisions so as to ascertain whether their legitimate business concerns may be accomplished equally well with a less differential impact. They must make a good faith search for alternative ways to accomplish their business purpose when an existing employment policy or contract provision establishes a built-in headwind for a religious minority.

As one court of appeals has said, "It is well settled . . . that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations." *Notelson v. Smith Steel Workers*, 643 F.2d 445, 452 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981). In *Robinson v. Lorillard*, 444 F.2d, at 799, the Fifth Circuit said: "Title VII requires that both the union and the employer represent and protect the best interest of minority employees."

In *Philbrook*, 757 F.2d, at 478, the court detailed contract changes that made it more, not less, difficult to accommodate respondent's religious needs. The court in *Philbrook* also noted that "various union officers testified that they had proposed changes in the collective bargaining agreement's leave policies, but all were rejected." *Id.*, at 487.

This Court has stated that "[t]he elimination of discrimination and its vestiges is an appropriate subject of bargaining. . . ." *Emporium Capell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975). See, also *International Union of Electrical Radio and*

Machine Workers v. NLRB, 684 F.2d 18, 25 (D.C. Cir. 1980). Acquiescing in a discriminatory contract itself subjects a party to such a contract to Title VII liability. *Bartmess v. Drewyers USA, Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 1939 (1971).

When a collective bargaining agreement fails to provide sufficient flexibility to permit equal employment opportunities, the burden should fall on both the company and the union to explain why such flexibility could not have been so provided in keeping with the business needs of both the employer and the union. In any event, the elimination of discrimination is a mandatory subject of bargaining. *Jubilee Manufacturing Co.*, 202 NLRB 272, 82 LRRM 1482 (1973), *aff'd*, 87 LRRM 3168 (1974).

Given the unequal bargaining power of the parties and the economic dependence of the employee, the employer's inflexibility set forth in policy can have a chilling effect on the employee's freedom to complain and negotiate. This difficulty is exacerbated by an inflexible collective bargaining agreement that diminishes an employee's employment opportunities or impacts on equal treatment as to the conditions and terms of employment because of an employee's religious practices.

In *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974), this Court recognized that majoritarian interests protected by collective bargaining agreements were subject to special legislative protection of individual religious practices under Title VII. Congress has stated that in a clash between majoritarian interests and an individual's right to equal employment opportunities, the guarantees of Title VII "are absolute and represent a congressional command that each employee be free from discriminatory practices." *Id.*, at 51.

Title VII's public policy objective of equal employment opportunities regardless of race, sex, or religion, and the National Labor Relations Act must be read together to arrive at the proper congressional will. "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc. v. Retail Clerk's Local 770*, 398 U.S. 235, 250 (1970).

It is right and proper for Congress to have given special attention to the religious needs of employees in Title VII because Congress itself had earlier granted unions the power to be the exclusive bargaining representatives of all employees. Since *Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944), this Court has recognized that federal labor laws giving broad powers to labor organizations involve government action. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), this Court declared that a collective bargaining agreement has "the imprimatur of the federal law upon it," and "the federal statute is the source of power" by which individual rights are "lost or sacrificed." *Id.*, at 232. The accommodation provided under Title VII thus involves obligations arising under federal legislation.

When Congress, by such labor legislation, makes it more difficult for an individual in the labor force to arrange with his or her employer for a particular religious need, it effectively inhibits the free exercise of an individual's religion and makes more difficult the accommodation of an individual's religious practices. According to former Senator Jennings Randolph, the legislative author of § 701(j), the statutory religious accommodation provision inserted in Title VII was a legislative attempt to preserve the free exercise of religion. 118 Cong. Rec. 705-706 (1972). It is therefore permissible and desirable for Con-

gress, by remedial legislation, to require both the employer and the union to accommodate the individual's religious needs so long as that accommodation does not cause either the employer or union, or those employees represented by the union, undue hardship.

CONCLUSION

Accordingly, *Amicus Curiae* urges this Court to affirm the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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